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No. 92-899

In The

Supreme Court of the United States

October Term, 1992

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Petitioners,

vs.

WILL STONE, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

MORTON P. COHEN
49 Stevenson Street
San Francisco,
California 94105
Telephone: (415) 904-6843

JOHN N. HAUSER
BETH H. PARKER*
CAROLYN L. REID
McCUTCHEN, DOYLE,
BROWN & ENERSEN
Three Embarcadero Center
San Francisco,
California 94111
Telephone: (415) 393-2000

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to address the standard for finding a party in contempt when there is no conflict between the circuits and when, even under San Francisco's supposed "flexible" standard, it would still be found in contempt?

2. Should this Court grant certiorari to reverse long-standing jurisprudence and permit San Francisco to argue fiscal constraints as a defense to contempt when it sought no modification of the underlying court orders?

3. Should this Court grant certiorari to address whether the circumstances leading up to the contempt must be unforeseen or unforeseeable, when those circumstances have no bearing on the contemnor's diligence in complying with court orders?

4. Should this Court grant certiorari to reverse dictum on an issue which was decided in San Francisco's favor and issue an advisory opinion on a matter which may never arise?

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INTRODUCTION

There is nothing to review here. Petitioners the City and County of San Francisco ("the City") say "reasonable diligence" is different from "all reasonable steps," and so manufacture a conflict among the circuits, even though no circuit court has ever suggested, much less held, that there is any conflict at all. The City suggests defenses to contempt that no court has ever adopted and that conflict with long-standing precedent everywhere. And the City asks for an advisory opinion on an early release order that was vacated at its request and may never be reinstated.

This case is not about conflicting rules. It is about the factual finding, made by a district judge who has overseen this case since 1978 and unanimously affirmed by the Ninth Circuit, that San Francisco violated, repeatedly and continuously, court orders defining the constitutional limits on jail overcrowding. Those findings compel a finding of contempt even under San Francisco's imagined "flexible" "reasonable diligence" standard; even if any case supported a rule that financial constraints could be a defense to contempt; and even if a contemnor could avoid contempt based on a non-existent "unforeseen circumstances" test. San Francisco quarrels with the findings and reargues facts on which it lost in the two courts below. But this Court does not sit to review facts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). At bottom, that is what the petition demands. The petition should be denied.

STATEMENT OF THE CASE

Respondents, pretrial detainees housed at San Francisco's Jail No. 1, filed this class action in 1978 to remedy unconstitutional conditions in the sixth floor of the Hall of Justice. Among the conditions challenged was the untenable population level at Jail No. 1.[1] (CR 1)[2]

On July 15, 1982, the parties agreed to a Consent Decree, which was entered by the district court. (CR 201) The Decree set standards by which San Francisco was to manage the jail. It included a provision that the jail's individual housing areas should not regularly house more inmates than the capacity set by the California State Board of Corrections. (CR 201 ¶ XIV) Based on those population figures, the parties negotiated a number of other conditions for the jail's operation. They agreed, for example, on a classification system, a staffing plan, how many toilets, beds, and showers were needed, the level of medical and mental health care, and the like. (*E.g.*, CR 201; CR 275; CR 374) Once the population levels are exceeded, these other agreements become inoperable.

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[1] San Francisco's Jail No. 1 was constructed in 1962, primarily to house pretrial misdemeanants. It has five dorms of double-decker bunks designed to sleep 28 inmates, six tanks with 26 beds, and several tanks for specially classified inmates. Pretrial detainees spend virtually 24 hours a day in these dorms with nothing to do.

[2] "CR" refers to the Clerk's Record filed with the Ninth Circuit. "RT" refers to portions of the recorder's transcript which were not part of the Clerk's Record. "App.-___" refers to the Appendix filed with the City's Petition.

San Francisco represents that it had a history of "compliance" with the consent decree and that in 1991 something "dramatically changed." (Pet. at 8) The record, however, is just the opposite. The record proves a persistent pattern of contempt for both the lower court's orders and the rights, health, and safety of the pretrial detainees housed at the Jail No. 1. Compliance only occurred in the past after the threat of sanctions coerced it. Here is the full story.

In June 1985, the class first moved to hold San Francisco in contempt for violating several provisions of the Decree, including those dealing with the facility's mandated population levels. (App. A-2; CR 222) As a result of that motion, in May 1986, the district court ordered the City to comply with its orders and appointed a Special Master to investigate, report, and recommend actions San Francisco should take to ensure compliance. (App. A-3; CR 261) Every progress report which the Special Master filed that year indicated continuing violations of the Decree, including persistent overcrowding. (CR 267 at 57; CR 268 at 50; CR 271 at 41; CR 318 at 28-29) As a result, he recommended in March 1987 that the district court impose sanctions when the jail exceeded its population capacity. (App. A-3; CR 282 at 10-11; *see also* CR 319 at 30)

The district court held a hearing in April 1987 on the contempt motion. At San Francisco's request, it continued the matter until June to give the City time to present a plan to address the overcrowding. (App. A-3; 4/30/87 RT at 18-19) The court indicated it would impose contempt penalties, including fines, if the plan was unsatisfactory.

To thwart concerns about its persistent recalcitrance, San Francisco agreed in June 1987 that it would house no more than 426 inmates in Jail No. 1. (CR 314 at 2) It agreed that if it failed to achieve either the overall capacity level for the jail or the capacity levels for individual housing units, the district court could "consider the possible immediate imposition of monetary sanctions." (*Id.* ¶ 18; App. A-3)

Despite these warnings, San Francisco continued to overcrowd the facility. On November 28, 1987, the district court issued an order to show cause why the City should not be held in contempt for violating the overcrowding provisions of its orders. (App. A-4; CR 331) At the subsequent hearing two months later, the court found egregious overcrowding and a failure on San Francisco's part to correct the situation. (CR 363 at 2) Even then, it did not immediately impose sanctions but gave San Francisco still more time, and more powers, to control the population. Among these was the ability of the Sheriff to release "all sentenced prisoners within the San Francisco County Jail system who have served 90%, 80%, and 70% of their sentences" as necessary to achieve capacity limits. (*Id.* ¶ 4(c)) The Sheriff immediately began to exercise this power by releasing prisoners at 70% of time served. (CR 373 at 41)

Still, the overcrowding did not abate. Throughout 1988 the overcrowding continued. (CR 373 at 70; CR 383 at 45) The district court held hearings in April, July, and October on the pending motion for contempt. Each time, the court continued the hearing to allow San Francisco more time to comply with the population limits. (App. A-4) Finally, following a status conference in late October

1988, the court found the overcrowding so serious that it ordered the imposition of fines of $300 per inmate per day if the population was not at its mandated level by March 15, 1989. (App. A-4; CR 399 ¶ 2)

The overcrowding did not stop between October 1988 and March 1989. On March 15 – almost four years after the first contempt motion was filed and the exact date on which fines were to be imposed – San Francisco finally came into compliance with the population levels set forth in the 1982 Consent Decree. The threat of fines of $300 per inmate per day had its desired effect.

San Francisco did nothing, however, to plan longterm for its jail population. In September 1988, the National Council on Crime and Delinquency projected that San Francisco would need 2109 beds by 1992 (a number which turned out to be accurate). (CR 424 at 7) At that time, there were only 1786 beds available City-wide. Thus, San Francisco knew in 1988 that if it did not fully use the early release powers granted it by the district court, it would need an additional 500 beds. (*Id.*)

To wean San Francisco from the court's orders and encourage long range planning, the Special Master began recommending in early 1989 that the City develop a plan to address overcrowding. He made this recommendation in two separate progress reports, filed in February and December 1989, respectively. (CR 423 at 96; CR 438 at 75-76) On February 8, 1990, the district court adopted the Special Master's recommendation and ordered San Francisco to present such a plan by July 15, 1990. (CR 437)

Despite this clear mandate, the San Francisco Board of Supervisors did not approve a plan until June 17, 1991,

almost a year after it was required. (CR 544 at 40) And that plan did essentially nothing to avert the overcrowding problem. Indeed, most of the proposals that would have had an impact on jail crowding were eliminated from the final draft for fiscal reasons. (*Id.*) As a result, the Special Master concluded, the "current funded proposals will not measurably reduce the population confined in the San Francisco jail system . . . the long term Jail Population Management Plan will not materially affect the crowding that presently exists in the jail system." (*Id.* at 45) The proposals did not even begin to address the 500 beds saved through the Sheriff's use of the court-authorized release programs.

Although San Francisco remained in compliance with the population orders for almost two years, on February 19, 1991, it again began to overcrowd. Between February 19 and June 30, 1991, the total jail capacity exceeded the 426 inmate cap on 30 different occasions. In that four month period, individual living units were overcrowded on 258 occasions; 822 inmates resided in living quarters that exceeded the district court's orders. (CR 544 at 29)

On May 30, 1991, the class moved for an order (1) holding the City in contempt, (2) seeking sanctions, and (3) ordering compliance with the Decree. (CR 492) The district court set a hearing for late July. Despite the pendency of the motion, the overcrowding did not abate. May, June, and July all saw chronic overcrowding. (CR 511, Ex. A) Both overall capacity and individual housing units regularly exceeded their agreed-upon levels.

These dramatic population increases occurred in 1991 despite a decrease in violent crimes reported during the

same period. The number of the most serious crimes committed went down almost every month between January and November 1991 as compared to 1990. (CR 569, Ex. A) Both reported offenses and total jail bookings decreased in the first six months of 1991 compared with 1990. (CR 544, at 33-34) And, although the jail was substantially more overcrowded in the fall of 1991 than it was during the spring, total arrests were actually lower in September through November 1991 as compared to March through May 1991. (CR 569, Ex. A)

At a hearing on July 31, 1991, the district court found that San Francisco had continued to exceed the capacity levels at Jail No. 1. (CR 513 at 17:24-18:3) When the City requested time to present a plan to address the problem (*id.* at 3), the court took the matter under submission. (*Id.* at 21:2-3) San Francisco acknowledged the blatant overcrowding but sought the district court's indulgence to develop a plan. It stated that if the plan was not acceptable, "the sword could fall." (*Id.* at 10, 16)

Rather than hear the matter in September as the parties had requested, the court postponed the second hearing on San Francisco's plan to avoid overcrowding until November 7, 1991. (CR 516) In the fall, as the class and experts had predicted, matters dramatically worsened. Between October 1 and November 4, 1991, individual housing units exceeded capacity every day but one. (CR 520 ¶ 5) During that one-month period, 963 inmates resided in unlawful conditions. (*Id.* ¶ 6)

At the second contempt hearing in November, the class submitted uncontroverted evidence that overcrowding had not abated since July, but had skyrocketed. (*Id.*)

The plan the City had promised to present "in a matter of a few weeks" after the July hearing (CR 513 at 11:5-6) had only recently materialized. It had not, however, been fully implemented. (CR 521 at 11) San Francisco did not deny the overcrowding, but again requested additional time to present a further plan to reduce the population. (*Id.* at 16:20-21) Once again, the district court took the matter under submission. (*Id.* at 19)

In December, the jail's population exploded. On December 2, 1991, for example, the jail was 133% of capacity. Twelve housing units exceeded capacity that day, some by close to 75%. Dorms 1 through 4, rated for 28 men, held approximately 48 inmates each. (CR 539, Ex. A)

On December 17, 1991, the sword fell. The district court found San Francisco in contempt for violating a series of court orders setting population levels at Jail No. 1. (App. B-15) It found the City had not taken all reasonable steps to ensure compliance. (*Id.* at 12-13) It ordered that beginning January 1, 1992, sanctions of $300 per day per person would accrue for each day San Francisco violated the population orders. (*Id.* at 15-16) All monies collected were to be made available for programs that would have a direct bearing on the jail's population levels. (*Id.* at 17)

On December 26, 1991, San Francisco filed a motion requesting that the court stay the order pending appeal or, in the alternative, reconsider its opinion. (CR 549) On December 30, the court denied both requests. (CR 572) The court again concluded that San Francisco had not taken all reasonable steps to comply with the Consent

Decree and subsequent orders. (CR 570 at 28:9-11) Among the steps which the court found the City could have taken but did not were:

> activation of the closed women's jail in San Bruno; renting of jail space from Alameda County; contracting with private vendors and halfway houses for work furlough beds; use of private contractor electronic supervision programs; partial use of the gymnasium in the Hall of Justice as a dormitory; termination of the contract with the U.S. Marshal for use of beds in the San Francisco jail system; and use of the emergency population procedures provided for in the August 12, 1987 order of the court.

(*Id.* at 28:13-22)

On December 31, 1991, San Francisco filed its notice of appeal. (CR 573) The appeal was expedited by the Ninth Circuit on January 8, 1992, and the contempt order stayed pending its resolution.

On June 25, 1992, a unanimous panel of the Ninth Circuit affirmed the district court's finding of contempt and imposition of prospective sanctions. It vacated a portion of the order which enabled the Sheriff to release inmates at 50% of time served to ensure compliance with the population orders. (App. A-33) The Ninth Circuit denied San Francisco's petition for rehearing and suggestion for hearing en banc on August 30. On November 23, 1992, San Francisco filed its petition for a writ of certiorari. Both the Ninth Circuit and The Hon. Sandra Day O'Connor, Circuit Justice for the Ninth Circuit,

denied San Francisco's application for a stay of the mandate pending its petition for a writ of certiorari.

SUMMARY OF ARGUMENT

San Francisco asserts four reasons why this Court should grant its petition for writ of certiorari and reverse a finding of contempt entered by a district court who has overseen this litigation for fourteen years and unanimously affirmed by the Ninth Circuit. Not one has merit.[3]

First, the City claims this Court needs to resolve a conflict between the circuits as to the standard for finding a party in contempt. No circuit has ever said there is a conflict; only San Francisco has manufactured it. The alleged "conflict" is one of semantics. In substance, the two standards are the same, the courts use them interchangeably, and they have the same end effect.

Even if there were an issue for this Court to resolve, this case does not present it. For even were this Court to adopt the more flexible standard which San Francisco proposes, it would not change the result. San Francisco was not "reasonably diligent" in complying with the

[3] Heightened deference should be accorded to the district court here because Judge Orrick has been involved with this case since 1978 and overseen the implementation of the consent decree for more than a decade. (App. A-12) *See Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 765 (1992) (O'Connor, J., concurring); *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (substantial deference given to district court's "years of experience with the problem at hand.")

district court's population orders, no matter how loosely defined that term is.

San Francisco's second reason for certiorari is equally spurious. It claims this Court should decide that a lower court should consider a government's fiscal constraints before adjudging it in contempt. This holding would reverse two long-standing doctrines. It would undermine the principle reaffirmed just last term that fiscal constraints cannot be used to justify the creation or perpetuation of constitutional violations. It would also enable parties, such as San Francisco here, to violate a court order and then challenge the validity of the underlying order as a defense to contempt.

San Francisco proposes, third, that the Court decide whether a defendant in a contempt proceeding must show that the circumstances giving rise to the violation were foreseeable. It provides no reason why this issue need be decided. There is none. The circumstances leading up to the contempt are irrelevant to the inquiry before the district court. The court must analyze instead the efforts the party has made once the violations have occurred to come into compliance.

Fourth, San Francisco seeks review of dictum in the Ninth Circuit opinion on an issue which the panel decided in San Francisco's favor. A party cannot appeal a ruling favorable to it. Nor can it ask for an advisory opinion where the district court has not yet applied the dictum and may not ever do so, thus providing no factual record to review.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD FOR HOLDING A GOVERNMENT DEFENDANT IN CONTEMPT.

1. No Case Supports San Francisco's Distinction Between "Reasonable Diligence" and "All Reasonable Steps"

San Francisco urges this Court to grant certiorari to resolve an alleged conflict between the circuits as to the standard for holding a party in civil contempt. (Pet. at 11) According to San Francisco, "reasonable diligence" is different from, and more "flexible" than, "all reasonable steps," and the circuits disagree on which standard applies. In fact, only San Francisco imagines a conflict. No court has ever found the standards to conflict; the cases use the terms interchangeably.

The only difference between the two formulations is a semantic one. Some courts describe the standard for contempt as "reasonable diligence." Others phrase it as "all reasonable steps." It is a distinction without a difference. No case suggests that a defendant can avoid contempt without making every reasonable effort to comply with a valid court order. Nor does any case so much as hint that the exercise of "reasonable diligence" requires anything less than the taking of "all reasonable steps."

The practical application of the two standards is also the same. Both rules require substantial compliance with the court order to avoid a finding of contempt. *See, e.g., Langton v. Johnston,* 928 F.2d 1206, 1220 (1st Cir. 1991)

("reasonable diligence" circuit stating formulation of its test as "satisfaction by diligent, good faith efforts, culminating in substantial compliance."); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461 (9th Cir. 1989) ("all reasonable steps" circuit stating that "substantial compliance with a court order is a defense to an action for civil contempt."); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). Neither finds technical inadvertence to be grounds for contempt. *E.g., National Advertising Co. v. Orange*, 861 F.2d 246, 250 (9th Cir. 1988); *General Signal Corp.*, 787 F.2d at 1379. Neither permits "good faith" as a defense. *E.g., Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Fortin v. Commissioner of Mass. Dept. of Public Welfare*, 692 F.2d 790, 796 (1st Cir. 1982).

Indeed, the courts use the two phrases interchangeably to describe the standard of compliance in a contempt proceeding.[4] Even those courts which, according to San

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[4] *See, e.g., Powell v. Ward*, 487 F. Supp. 917 (S.D.N.Y. 1980), *modified*, 643 F.2d 924 (2d Cir. 1981) (because the relevant question is whether defendants "have been reasonably diligent," a contempt finding is appropriate where defendants have failed to make "all reasonable efforts" to comply); *Alberti v. Klevenhagen*, 610 F. Supp. 138, 141 (S.D. Tex. 1985) (court looked to whether defendants took "all reasonable steps" to insure compliance and found them in contempt because they had "not been reasonably diligent"); *Nelson v. Collins*, 659 F.2d 420, 431-32 (4th Cir. 1981) (Winter, J., concurring and dissenting) (no defendant who has been "reasonably diligent" can be held in contempt; thus no contempt where defendant took "all reasonable steps" to eliminate overcrowding); *Reed v. Rhodes*, 500 F. Supp. 363, 400 (N.D. Ohio), *aff'd in part and rev'd in part*, 635 F.2d 556

Francisco, favor one usage over the other, do not do so exclusively.[5] Courts discussing the standard for contempt routinely rely on cases from circuits which, according to San Francisco, are in direct conflict.[6]

(6th Cir. 1980) (relevant inquiry is whether defendants took "all reasonable steps" to insure compliance; defendants' failure to exercise "reasonable diligence" thus led to finding of contempt).

[5] For example, *Powell v. Ward*, a case out of the Second Circuit (which San Francisco designates a "reasonable diligence" circuit) finds contempt where the defendant failed to make *"all reasonable efforts"* to comply with the court's order (emphasis added). Conversely, in *Thompson v. Enomoto*, 542 F. Supp. 768, 769 (N.D. Cal. 1982), out of the Ninth Circuit (which San Francisco deems an "all reasonable steps" circuit) the court stated that it could not find defendants in contempt of court "where . . . defendants have been *reasonably diligent* in attempting to accomplish what was agreed to in the Decree." (emphasis added)

[6] *See, e.g., United States v. Darwin Construction Co.*, 873 F.2d 750, 755 (4th Cir. 1989) (Fourth Circuit case requiring "all reasonable steps" relies on cases from Ninth, Eleventh, Fifth, D.C., and Third Circuits); *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991) (Sixth Circuit case requiring "all reasonable steps" relies on cases from First and Second Circuits); *United States v. Hefti*, 688 F. Supp. 1367, 1370 (E.D. Mo. 1988), *aff'd*, 879 F.2d 311 (8th Cir. 1989) ("all reasonable steps" case from Eighth Circuit relies on cases from Second, Fourth, and Ninth Circuits); *Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 26 (D.P.R. 1987) ("all reasonable steps" case from First Circuit relies on cases from Second, Ninth and D.C. Circuits); *Mobile County Jail Inmates v. Purvis*, 551 F. Supp. 92 (S.D. Ala. 1982), *aff'd*, 703 F.2d 580 (11th Cir. 1983) ("all reasonable steps" case from Eleventh Circuit relies on cases from First and Ninth Circuits); *Reed v. Rhodes*, ("all reasonable steps" case from Sixth Circuit relies on cases from First, Second, Third, Ninth, and D.C. Circuits); and *Palmigiano v. Garrahy*, 448 F. Supp. 659 (D.R.I. 1978) ("all reasonable steps" case from First Circuit relies on cases from Second and Ninth Circuits).

Not one of these cases suggests that there is a difference between "reasonable diligence" and "all reasonable steps. An understanding of the "reasonably diligent" test explains why. Diligence is relevant to the question of a party's ability to comply with a prior court order. Inability is a defense to contempt. *United States v. Rylander*, 460 U.S. 752, 757 (1983). A contemnor has the burden to demonstrate impossibility or inability to comply, *id.*; *United States v. Fleischman*, 339 U.S. 349, 362-63 (1950), which burden is difficult to meet. *Fortin*, 692 F.2d at 796; *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974). Thus, reasonable diligence in context means that that despite its best efforts, a contemnor has still been unable to comply with a prior court order. If successful, this would amount to the alleged contemnor having taken all reasonable steps.

Citing nothing, San Francisco offers two supposed differences between "reasonable diligence" and "all reasonable steps." First, San Francisco argues that under the supposedly more lenient "reasonable diligence" test, courts will examine a defendant's compliance efforts no matter how extreme the noncompliance. Not so, it implies, for "all reasonable steps." (Pet. at 15) What San Francisco ignores, however, is that a court must make this examination in every contempt proceeding. Defendants are not strictly liable for violating court orders. Whenever a court determines that a violation has occurred – extreme or otherwise – it must decide whether the defendant exerted adequate efforts to avoid its occurrence.[7]

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[7] Indeed, the district court here did just that. It did not, as San Francisco implies, merely presume the City's contempt

Second, the City attempts to distinguish "reasonable diligence" from "all reasonable steps" by mischaracterizing what "all reasonable steps" entails. San Francisco insists that "all reasonable steps" actually requires "perfect diligence." (Pet. at 14) "Good advocates," it argues, "will always be able to come up with one more 'reasonable step' . . . " (*Id.*)

But again, no court has so held. The Ninth Circuit rejected this interpretation when San Francisco made it on appeal. It denied that "all reasonable steps required perfection: "The City mischaracterizes the 'every reasonable step' rule by asserting that it must consider every option that the court could conceive." (App. A-14) Its opinion reaffirmed long-standing law that technical or inadvertent violations will not support a finding of contempt. (App. A-14, *citing General Signal Corp.*, 787 F.2d at 1379) Thus, no court, including the Ninth Circuit, has held that "all reasonable steps" is different from "reasonable diligence," much less that the standard requires perfection.

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upon finding the court order violated. Rather, just as in *SEC v. Porto*, 739 F. Supp. 1236 (N.D. Ill. 1990), and *New York State NOW v. Terry*, 697 F. Supp. 1324, 1332 (S.D.N.Y. 1988), *aff'd in part and modified in part*, 886 F.2d 1339 (2d Cir. 1989), which the City cites, the district court examined San Francisco's compliance efforts before making any finding of contempt. (App. B-9) As in *Porto* and *Terry*, San Francisco's efforts were found inadequate. (App. B-11 – B-13) Thus, the degree of San Francisco's noncompliance did not compel the court's finding of contempt; its failure to exert adequate efforts to comply did.

2. Even If the Standards Differed, this Case Would Not Put the Issue; San Francisco Was In Contempt Under Any Standard

Even if there were a conflict, the Court would have no occasion to decide it here. Whatever the standard, the City was in contempt. Before a party can invoke "reasonable diligence" as a defense, it must be in substantial compliance. *Langton v. Johnston*, 928 F.2d 1206, 1220 (1st Cir. 1991); *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990) ("Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made part of a good faith effort at compliance."). San Francisco has not been in substantial compliance with the lower court's orders since February 1991 when overcrowding resumed. (App. B-10) Even after the class filed for contempt in late May, the City continued to overcrowd Jail No. 1. At the time the district court found San Francisco in contempt eight months later, the jail was operating at 130% capacity. Dorms rated for 28 men held on average 48 inmates each. (CR 539, Ex. A)

San Francisco also can show no diligence in achieving compliance. The district court waited seven months after the motion was filed before finding the City in contempt. During that time, the overcrowding did not abate; it dramatically worsened. In April 1991, the month before the motion was filed, 541 pretrial detainees were confined in excess of the Jail's capacity limits. In the month of October, six months later, individual housing units exceeded capacity every day but one. 963 inmates resided in unlawful conditions, almost double the April figure. (App. B-8 – B-9) As the Ninth Circuit recognized, this delay in obeying court orders alone justified the

finding of contempt. (App. A-15) *See Toussaint v. McCarthy*, 597 F. Supp. 1427, 1430 (N.D. Cal. 1984) (undisputed delay of eight months in obeying court order "sufficient in itself to establish that respondents . . . did not act with reasonable dispatch.")

The record also amply demonstrates that San Francisco did virtually nothing while the contempt motion was pending to stem the rampant overcrowding. Twice, it begged the district court to postpone a finding of contempt so it could develop a plan. (CR 513 at 3; CR 521 at 16) Twice, the court indulged the City's wishes. (CR 516; CR 521 at 16) At the second hearing in November 1991, San Francisco finally presented a plan. But the measures had not been fully implemented. (CR 521 at 11) As the district court found and the City later admitted, the 105 beds the plan theoretically created were insufficient to achieve compliance with the district court's population orders and to remedy the overcrowding it knew would escalate in the coming winter months. (App. B-9)

San Francisco asks the Court to second guess both lower courts' findings by pointing to its "tremendous commitment of resources" as the "strongest evidence" of its diligence. (Pet. at 16) The figures it cites, and the programs it claims to have instituted, however, are highly inflated. Little of the "$30-plus million" the City repeatedly quotes (Pet. at 16) was spent to reduce overcrowding at Jail No. 1; that sum includes monies spent for virtually every program instituted in recent years throughout San Francisco's jail system. It includes funds to upgrade Jail No. 1, increase staffing at Jail No. 3, build a recreation center at the Hall of Justice, renovate a short term medical facility, and construct a new medical and mental

health center.[8] The first "$500,000 budget reserve" went primarily for emergency staffing at Jail No. 3; only $20,000 (4%) went directly to Jail No. 1.

Finally, San Francisco suggests that its exploration of renting jail beds in neighboring counties evidences its diligence. (Pet. at 17) In fact, it did not even consider this option until the contempt motion had been pending several months. (CR 554) It did not implement it until April 1992, fifteen months after the overcrowding began, almost a year after the contempt motion was filed, and five months after the contempt order issued. Had it been reasonably diligent, San Francisco would have investigated this option when overcrowding began or the class moved for contempt. At the very least, it should have explored it when the availability of Alameda County beds was published in the local papers in September 1991. "County Jail Seeks More U.S. Prisoners," *The San Francisco Chronicle*, at A14 (Sept. 10, 1991).

In sum, San Francisco's devotion to the overcrowding crisis has been anything but diligent. Even were this Court to adopt the more flexible standard which the City suggests, it would still be found in contempt.

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[8] San Francisco operates four jails. Jails No. 1 and No. 2 are located on the sixth and seventh floors of the Hall of Justice. Jails No. 3 and No. 7 are located in the neighboring city of San Bruno, California. The lawsuit only concerns Jail No. 1.

B. PERMITTING A GOVERNMENT DEFENDANT TO PLEAD POVERTY AS A DEFENSE TO CONTEMPT WOULD REVERSE LONG STANDING LEGAL PRINCIPLES.

San Francisco urges this Court to grant certiorari to decide whether a court should consider a local government's fiscal constraints in measuring its ability to comply with a consent decree. (Pet. at 20) It claims *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748 (1992), opens the door to relax the required obedience to court orders for government defendants in times of fiscal austerity. It seeks to extend dictum in that case, which enunciated standards for modifying consent decrees, to one where no modification was sought and a party was found in contempt.

But modification is not contempt, and no case, much less *Rufo*, has ever applied the same standards to these two, very different, situations. All that *Rufo* did was instruct lower courts to take financial constraints into account in considering how to tailor a consent decree modification to meet significantly changed circumstances. 112 S.Ct. at 764. *Rufo* explicitly reaffirmed well established law that "financial constraints may not be used to justify the creation or perpetuation of constitutional violations." 112 S.Ct. at 764; *see also* 112 S.Ct. at 766 (O'Connor, J., concurring).[9]

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[9] Virtually every federal circuit has recognized this time honored principle. *E.g., Morgan v. District of Columbia*, 824 F.2d 1049, 1067-68 (D.C. Cir. 1987); *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *Lareau v. Manson*, 651 F.2d 96, 104 (2d Cir. 1981); *Smith v.*

Permitting local governments to assert lack of resources as a defense to contempt of a court order would contradict this long standing principle. A consent decree entered in institutional reform litigation is an agreement between the parties, approved by the court, to ensure compliance with constitutional requirements. Allowing a governmental entity to use fiscal constraints to avoid its obligations under a decree would guarantee the use of this defense to perpetuate constitutional violations.[10]

Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

[10] This is precisely what would happen here. The Consent Decree and subsequent court orders set a capacity level for both individual housing units and the overall facility at the level rated by the California State Board of Corrections. San Francisco overcrowds the facility when it exceeds those levels. Because Jail No. 1 houses pretrial detainees who retain the presumption of innocence pending trial, they may not be confined in conditions amounting to punishment. *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). Courts have regularly found overcrowding unconstitutionally punitive for this class of prisoners. *See, e.g., Inmates of Allegheny County Jail v. Wecht*, 754 F.2d 120, 127 (3rd Cir. 1985); *Lareau*, 651 F.2d at 105; *Gross v. Tazewell County Jail*, 533 F. Supp. 413, 419 (W.D. Va. 1982); *Rutherford v. Pitchess*, 457 F. Supp. 104, 109 (C.D. Cal. 1978).

San Francisco attempts to avoid this obvious result by maintaining that the district court made no finding of any constitutional violation. (Pet. at 19) This is incorrect. The contempt order repeatedly states that inmates have been housed "unlawfully" and "illegally." (App. B-7, B-10) In assessing fines, the district court said that it "would not sit still for an effort to deprive citizens of important rights made available to them by the Eighth Amendment." (App. B-15) Moreover, by specifying measures to alleviate overcrowding in its court orders, the district court implicitly recognized the

Moreover, San Francisco's proposed rule would create legal havoc, not harmony. This Court has long held that one cannot violate a court order and then, as a defense to the contempt, challenge the validity of the underlying order. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386-87 (1980); *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948). A party's remedy is to seek modification of the order before a violation occurs. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439-40 (1976); *Walker v. Birmingham*, 388 U.S. 307, 316-21 (1967). It cannot violate its precepts and then argue the original order was unjust. As this Court has said:

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

United States v. Rylander, 460 U.S. 752, 756 (1983); *Maggio*, 333 U.S. at 69.

Permitting a party to claim lack of financial resources as a defense to contempt would "foster" such "experimentation." It would encourage government defendants to ignore existing court orders and, after the fact, argue fiscal constraints prevented their compliance. As the

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existence of unconstitutional conditions. *See Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

City's Petition makes clear, there will always be some other civic program which demands its attention. (Pet. at 16) Fiscal constraints would always be available as a defense. The City took these constraints into account before agreeing to the consent decree in the first place. In the absence of a request for modification, it should not be able to raise them as a defense. As Chief Justice John Marshall said as long ago as 1809: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . . " *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809); *see also Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

San Francisco offers no reason to upset this settled authority. It had a remedy, which it chose not to exercise. It could have moved to modify the Consent Decree based on a showing of significantly changed circumstances. *See Rufo*, 112 S.Ct. at 760-62. Yet, neither before the overcrowding resumed nor at any time during the eight months that the contempt motion was pending did the City seek to modify the Decree.[11] Instead, it chose self-

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[11] San Francisco's strategic decision is not surprising. Modification would defeat a core remedial goal of the Consent Decree – to eliminate overcrowding. Because the court's orders merely set the population for the jail at the levels mandated by the California State Board of Corrections, they cannot be increased without violating the constitution. As this Court recently recognized in *Rufo*, 112 S.Ct. at 763, a modification must not create or perpetuate a constitutional violation.

Moreover, the population levels dictated the parameters of other provisions contained in the Consent Decree; the levels of staffing, medical and mental health care, time for recreation,

help. Now, at this late date, it wants to claim poverty as its excuse. That is exactly the "experimentation with disobedience" which this Court has condemned. *Rylander*, 460 U.S. at 756.

Finally, even were this Court to reverse its longstanding precedent and permit governmental entities to use fiscal constraints as a defense to contempt, it would not change the result here. The lower court considered the City's economic plight before issuing its contempt order. Appreciation for San Francisco's fiscal problems caused the court to postpone twice the hearing on contempt to afford the City ample time to develop a plan to remedy the overcrowding. The contempt order explicitly stated that "the court has recognized the difficult financial problems impacting the City and its various departments and has exercised great restraint in not imposing sanctions." (App. B-14) The district court reiterated its attention to San Francisco's financial problems at the hearing for reconsideration of the contempt finding.[12] (CR 570 at 9)

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and the like all depended on the number of inmates confined in the facility. These would all have to be changed if the capacity levels were relaxed. Modification is inappropriate if it will necessitate changes to all aspects of a decree. *See Rufo* 112 S.Ct. at 762.

[12] There was also ample evidence in the record that many of the alternatives available to San Francisco to remedy the overcrowding cost less than continued incarceration. The City could implement several alternatives – for example, electronic home monitoring or county parole – which were significantly cheaper than detention. The district court also permitted the City to early release inmates at up to 50% of time served. (App. B-18) San Francisco chose to challenge this free solution to the overcrowding problem on appeal. It should not be able to argue that fiscal constraints limit its ability to comply with court orders

C. SAN FRANCISCO CITES NO REASON FOR ALLOWING A DEFENDANT TO CLAIM UNFORESEEN CIRCUMSTANCES AS A DEFENSE TO CONTEMPT.

San Francisco asks this Court to grant certiorari to decide whether a defendant in a contempt proceeding must show that the circumstances giving rise to the violation were unforeseeable. (Pet. at 23). The City provides no reason why this issue need be decided. It does not point to a conflict between the circuits. *See* Sup. Ct. R. 10.1(a). It does not suggest that the Ninth Circuit's unanimous affirmance of the district court so far departed from the accepted course of judicial proceedings to warrant Supreme Court review. *Id.* Nor does it explain how resolution of this issue would make any difference to this case.

In fact, the Ninth Circuit's decision comports with this Court's teachings. As the Ninth Circuit correctly found (App. A-12 n.9), the moving party has the burden of showing by clear and convincing evidence that the contemnor violated a specific and definite order of the court. *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). The burden then shifts to the contemnor to demonstrate why it was unable to comply. *United States v. Rylander*, 460 U.S. 752, 757 (1983); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). There is absolutely no dispute here

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when it has deliberately rejected a solution which would impose no costs. As its belated decision to rent beds in Alameda County shows, it is not money which thwarts compliance but a lack of political incentive.

that the district court orders were specific and definite and that they were violated. (App. B-10) The only issue was whether San Francisco had met its burden. *See Sekaquaptewa v. MacDonald*, 544 F.2d 396, 404 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986).

The reason for the jail population's explosion, and San Francisco's ability to predict it, are irrelevant to this inquiry. This Court long ago held that good faith is not a defense to contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Thus, whether the City should or could have anticipated the population increase has no bearing on whether it can be found in contempt.[13] The only issue is the efforts it took to comply with the governing court orders once it found itself in violation. Under San Francisco's theory, it could escape contempt if it proved it had not, however unreasonably, foreseen the circumstances giving rise to the violations. This is tantamount to asserting good faith as a defense to contempt.

Once again, all of this is academic. Even were this Court to reverse long-standing precedent, recognize unforeseen circumstances as an excuse for contempt, and remand the contempt finding for reconsideration, the result would not change. As the unanimous Ninth Circuit panel found, the 1991 upsurge in the jail population was in fact foreseen. (App. A-15) In 1989, the National Council on Crime and Delinquency published a report which

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[13] Unforeseen circumstances may, in some circumstances, be grounds for modification of a decree. *Rufo*, 112 S.Ct. at 760. But that is not at issue here since San Francisco chose not to seek modification of the underlying court orders.

predicted that San Francisco's jail population would reach 2109 inmates per day in 1992. (CR 424 at 7) In February 1990, the Special Master appointed by the district court to oversee implementation of the Decree, predicted the population would be 2055 inmates per day. (CR 438 at 29) Both predictions were very close to target.[14] (App. A-15)

D. THE COURT SHOULD NOT ISSUE AN ADVISORY OPINION ON AN ISSUE DECIDED IN SAN FRANCISCO'S FAVOR

Finally, San Francisco seeks an advisory opinion on the district court's early release order. It claims that although the Ninth Circuit vacated this portion of the order, it improperly implied that in the future the district

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[14] San Francisco ignores these predictions and now claims that the impact of the Tenderloin Task Force on the Jail's population was what was unforeseen. (Pet. at 22-23) The City should have known that creation of a special police task force in a high crime area would have increased the jail population. Three factors influence prison population: the number of arrests, prosecution policies, and sentencing and parole decisions. *Nelson v. Collins*, 659 F.2d 420, 426 (4th Cir. 1981) The Task Force was intended to influence all three.

Moreover, San Francisco had long been put on notice that it was responsible for any impact police policy changes had on jail population. Beginning in 1986, the Special Master repeatedly warned in his reports that increased police activity inevitably meant an increased jail population. (CR 329 at 34; CR 329 at 4; CR 446 at 27) He also reported that an increase in felony arrests inevitably reduced the possibility of releases. (CR 329 at 4)

court may consider 50% early release as a remedy for contempt if monetary sanctions fail to produce compliance with the court's population orders. (Pet. at 24) Because the lower court has not yet authorized 50% early releases, this issue is not ripe for review.

First, San Francisco cannot appeal an issue that came out its way. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980); *Perez v. Ledesma*, 401 U.S. 82, 87 n.3 (1971). "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review or findings he deems erroneous which are not necessary to support the decree." *Roper*, 445 U.S. at 335, *quoting Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). As San Francisco admits, the Ninth Circuit vacated the portion of the contempt order authorizing 50% early releases. (App. A-33)

Second, the issue is not ripe for review. Although the Ninth Circuit implied that the district court might consider the early release remedy if fines fail to produce their desired effect (App. A-33), this has not yet occurred. The lower court has not yet considered whether the threat of sanctions are ineffective and whether other alternatives are inadequate. (App. A-33) Thus, there is no issue and no factual record for this Court to review. *See Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974)(request for writ of certiorari denied where district court had not yet formulated plan which was challenged on appeal), *modified*, 422 U.S. 1004 (1975); *California v. Green*, 399 U.S. 149, 169-70 (1970) (constitutional claim that evidence inadmissible was unripe because lower court had not originally addressed it, relevant facts were unclear, and other grounds might make issue unnecessary on remand).

CONCLUSION

For the reasons set forth above, this Court should deny San Francisco's Petition.

Respectfully submitted,

JOHN N. HAUSER
BETH H. PARKER*
CAROLYN L. REID
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

MORTON P. COHEN
49 Stevenson Street
San Francisco, CA 94105
Telephone: (415) 904-6843

Attorneys for Respondents

*Counsel of Record

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